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No. _____

Supreme Court, U.S.
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In The
Supreme Court Of The United States

OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the Connecticut Department of Correction, in his individual capacity,
Petitioner,

v.

ERNEST P. MELE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were the petitioner, Raymond M. Lopes, Commissioner of the Connecticut Department of Correction, in his individual capacity, and the respondent, Ernest P. Mele.

Raymond M. Lopes, Commissioner of the Connecticut Department of Correction, in his official capacity, William A. O'Neill, in his capacity as Governor of the State of Connecticut, Joseph I. Lieberman, in his capacity as Attorney General of the State of Connecticut, and Victor Liburdi, Warden of the Connecticut Correctional Center — Cheshire, in his official and individual capacity, are also parties to proceedings in this matter in the United States District Court for the District of Connecticut, and represented by counsel for the petitioner. Since issues regarding these parties were not present in the appeal to the Second Circuit, they are not named as parties herein.

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RAYMOND M. LOPES, Commissioner of the Connecticut Department of Correction, in his individual capacity,
Petitioner,

v.

ERNEST P. MELE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Raymond M. Lopes, in his individual capacity, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in this case on November 6, 1986.

OPINIONS OF THE COURTS BELOW

The memorandum of decision of the United States District Court for the District of Connecticut has not been officially reported. The District Court's memorandum of decision is printed in the Appendix hereto at pp. 4A-11A.

The judgment and opinion of the United States Court of Appeals for the Second Circuit has not been officially reported. The judgment and opinion of the Second Circuit is printed in the Appendix hereto at pp. 1A-3A.

JURISDICTION

The judgment and the opinion of the United States Court of Appeals for the Second Circuit was made and entered on November 6, 1986 and a copy is printed in the Appendix to this Petition at pp. 1A-3A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. Amend. XIV, and Conn. Gen. Stat. §§ 5-202, 5-240. Pertinent text of these constitutional and statutory provisions is printed in the Appendix, in accordance with U.S. Supreme Court Rule 21.1(f).

STATEMENT OF THE CASE

This case is a civil rights action initially brought in the United States District Court for the District of Connecticut by respondent Ernest P. Mele,[1] pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. The jurisdiction of the District Court was based upon 28 U.S.C. §§ 1331, 1343.

Respondent Mele's complaint challenged compliance with due process requirements prior to the decisions to impose discipline on a public employee. The respondent had been employed as a Lieutenant in the Connecticut Department of

[1] Although the respondent claims to represent a putative plaintiff class in his Amended Complaint, at the time this Petition is filed no plaintiff class has been certified, nor has any motion for class certification been filed.

Correction. J.A.[2] 6, Amended Complaint, ¶ 15. On April 30, 1984, the respondent was placed on leave without pay pending the outcome of investigation into events alleged to have occurred in April 1984. J.A. 24, 26, Affidavit of Raymond M. Lopes, ¶ 9, Exhibit A. On May 24, 1984, the leave without pay was extended indefinitely. J.A. 24, 27, Affidavit of Raymond M. Lopes, ¶ 10, Exhibit B.

Subsequently, on August 16, 1984, the respondent pleaded guilty, under the "Alford" doctrine to the crime of Sexual Assault in the Fourth Degree, Conn. Gen. Stat. § 53a-73a, and was adjudged guilty. The respondent was provided with a one year suspended sentence and three years probation. J.A. 24-25, 29-30. Affidavit of Raymond M. Lopes, ¶ 11, Exhibit D.

On August 23, 1984, the respondent was dismissed from employment. J.A. 25, 28, Affidavit of Raymond M. Lopes, ¶12, Exhibit C. The respondent took full advantage of the statutory appeal procedure provided in Conn. Gen. Stat. § 5-202. He submitted a grievance to the Commissioner of Administrative Services, which was denied. J.A. 7, Amended Complaint, ¶¶ 21, 22. He took an appeal to the Employees' Review Board. J.A. 8, Amended Complaint, ¶ 25. The Employees' Review Board affirmed his dismissal, after a hearing. J.A. 8, Amended Complaint, ¶¶ 23, 24.

The respondent did not challenge the due process accorded him during the course of this statutory appeal procedure. Rather, he alleged only that he was denied due process in what took place prior to the decisions to discipline him. *E.g.*, J.A. 6, 7, 8, 10, Amended Complaint, ¶¶ 17, 19, 25, 29. In particular, the respondent alleged that prior to his suspension and dismissal, he had no notice of the charges against him and no opportunity to respond. J.A. 7, 8, Amended Complaint, ¶¶ 19, 25. He alleged that Conn. Gen. Stat. § 5-240,

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[2] The abbreviation "J.A." refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

which authorizes an appointing authority to impose disciplinary measures, is unconstitutional on its face and as applied to him. J.A. 10, Amended Complaint, ¶¶ 29, 30.

The defendants named in the Complaint were the Connecticut Department of Correction,[3] Raymond M. Lopes, Commissioner of Correction, in his official and individual capacity, William A. O'Neill, in his capacity as Governor of the State of Connecticut, Joseph I. Lieberman, in his capacity as Attorney General of the State of Connecticut, and Victor Liburdi, Warden of the Connecticut Correctional Center — Cheshire, in his official and individual capacity. R.[4] 1, Complaint, ¶¶ 4-7; J.A. 4-5, Amended Complaint, ¶¶ 5-8.[5]

On February 4, 1986, petitioner Lopes and the other defendants moved the District Court, pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(6), to dismiss several claims. J.A. 13, Motion to Dismiss. The motion was granted in part and denied in part. Relevant to this Petition is the denial of the motion to dismiss insofar as it sought dismissal of damages claims against petitioner Lopes, in his individual capacity, based upon the doctrine of qualified immunity. Petitioner Lopes claimed that he was entitled to qualified immunity since the law regarding due process to be provided prior to a decision to take disciplinary action was not clearly established before the decision of *Cleveland Bd. of Ed. v. Loudermill*, ____U.S.____, 105 S.Ct. 1487 (1985). This claim was rejected by the District Court. App.[6] 9A-10A.

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[3] The respondent dropped the Department of Correction as a defendant in an Amended Complaint. J.A. 3.

[4] The abbreviation "R." refers to the Record filed with the United States Court of Appeals for the Second Circuit.

[5] The respondent also alleged that defendants Lopes and Liburdi were representative of a putative defendant class of appointing authorities. As with the claims regarding the putative plaintiff class, as of the date this Petition is filed, no defendant class has been certified, nor has any motion for certification of such a class been filed.

[6] The abbreviation "App." refers to the Appendix to this Petition.

Petitioner Lopes appealed the District Court's decision, on the qualified immunity issue, to the United States Court of Appeals for the Second Circuit. The jurisdiction of the Second Circuit was based upon 28 U.S.C. § 1291. *See Mitchell v. Forsyth*, ____U.S.____, 105 S.Ct. 2806, 2816-2817 (1985). The Second Circuit affirmed the action of the District Court. App. 2A. The Second Circuit concluded that the law was clearly established prior to the decision in *Loudermill*.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Certiorari should be granted in this case because the United States Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of other Courts of Appeals on the same issue. The Second Circuit affirmed a decision by the District Court refusing to dismiss damages claims against petitioner, in his individual capacity, notwithstanding arguments that qualified immunity shielded him from such claims for damages since the law regarding due process to be accorded prior to a decision to impose discipline on a public employee was not clearly established until *Cleveland Bd. of Ed. v. Loudermill*, ____U.S.____, 105 S.Ct. 1487 (1985).

A review of the decisions in the First, Third, Fourth and Fifth Circuits demonstrates that there is a conflict between the decisions in these circuits and the decision of the Second Circuit in this case. In this case, the Second Circuit addressed an alleged failure before the *Loudermill* decision to provide a due process mechanism prior to a decision to impose discipline, and affirmed the denial of a motion to dismiss damages claims based upon qualified immunity. Thus, a public official may be liable for damages, in his individual capacity, in the Second Circuit under these circumstances, while he would be immune from such liability for damages in other circuits.

On October 29, 1985, and following *Loudermill*, the Fourth Circuit noted that "[t]here was long considerable doubt whether a public employee enjoys a right to some sort of pre-termination hearing." *Buschi v. Kirven*, 775 F.2d 1240, 1255 (4th Cir. 1985).

> It had been generally understood in this Circuit that, where there was an adequate post-hearing remedy available for public employees who were discharged, as there was in Virginia, a pre-termination hearing was not required . . . . *However, on March 19, 1985,* the Supreme Court in *Cleveland Board of Education v. Loudermill*, ____U.S.____, ____, 105 S.Ct. 1487, 1493-94, 84 L.Ed.2d 494, 504 (1985), held that an employee who has a constitutionally protected property interest in his employment . . . is entitled to "some kind of a hearing" prior to discharge.

Buschi, 775 F.2d at 1255 (emphasis added).

The Fourth Circuit held in *Buschi* that summary judgment should have been granted against any claim for recovery of damages. *Buschi*, 775 F.2d at 1256. In so holding, the Fourth Circuit noted that "failure to grant a pre-termination hearing was not at the time in violation of clearly established law. . . ." *Id.*

Likewise, the Third Circuit, in a series of decisions, took the same approach as the Fourth Circuit. As late as June 6, 1984, the Third Circuit, relying on *Arnett v. Kennedy*, 416 U.S. 134 (1974), recognized that there was no entitlement to a hearing prior to a decision to discharge an employee.

> We do not understand Cohen to argue that he is entitled to a pretermination hearing even if he is guaranteed back pay upon reinstatement. Nor would we be persuaded by such an argument. The procedures established by the Philadelphia Home Rule Charter and Civil Service Regulations promulgated thereunder are virtually identical to those approved by the

> Supreme Court in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

Cohen v. City of Philadelphia, 736 F.2d 81, 84 n.6 (3d Cir. 1984), *cert. denied*, ____U.S.____, 105 S.Ct. 434 (1984).

It was only after *Loudermill* that the Third Circuit determined that some procedure was required prior to a decision to deprive a public employee of a property interest.

> In light of *Cleveland Bd. of Education v. Loudermill*, ____U.S.____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) this court, in *Stana v. School District of the City of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985), determined that pre-termination procedures are a requirement of due process where not impracticable.

Brown v. Trench, 787 F.2d 167, 171 (3d Cir. 1986).

The Third Circuit, in *Brown*, noted that its previous *Cohen* decision provided support for the contrary position. "In *Cohen*, this court believed that state-provided post-termination remedies were sufficient to meet the requirements of due process." *Brown*, 787 F.2d at 171.

Similarly, the Fifth Circuit, on May 10, 1985, noted that prior to *Loudermill*, language in some of the decisions of the Supreme Court suggested that state procedures for terminating property rights could limit the substantive property interest. *Levitt v. University of Texas*, 759 F.2d 1224, 1232 (5th Cir. 1985).

Likewise, the First Circuit, on May 16, 1985, recognized that:

> In *Cleveland Board of Education v. Loudermill*, ____U.S.____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the United States Supreme Court *recently delineated the scope of pretermination procedures that are due public employees.*

Brasslett v. Cota, 761 F.2d 827, 833 (1st Cir. 1985) (emphasis added).

Moreover, prior to *Loudermill*, at least one Justice of the Supreme Court was of the opinion that state laws could, by the procedures surrounding an employee's job security, define the extent of the employee's property interest in public employment. *Loudermill*, ___U.S. at ___, 105 S.Ct. at 1502-1504 (Rehnquist, J., dissenting).

As argued above, it should be clear that there is a split among the courts of appeals for the various circuits. The Court should grant certiorari to resolve this split in order to resolve the uncertainty that the split has created with respect to the qualified immunity of public officials. Unless the split is resolved, an official's qualified immunity may be applicable in one circuit while his counterpart in another circuit may be found to be personally liable in damages for the same conduct.

II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN *DAVIS V. SHERER*, 468 U.S. ___, 104 S.CT. 3012 (1984)

The issue of qualified immunity within the context of alleged failure to comply with due process requirements is not new to the Supreme Court. On June 28, 1984, the Court concluded that the law regarding procedures to be employed prior to a decision to discipline a public employee was not "clearly established." *Davis v. Sherer*, ___U.S.___, ___, 104 S.Ct. 3012, 3018-3019. The Court in *Davis* applied the qualified immunity test previously articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . If the law at that time was not clearly established, an official could not

> reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Harlow, 457 U.S. at 818.

The standard developed in *Harlow* related to legal questions. The Court

> recognized an entitlement not to stand trial or face other burdens of litigation, *conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.* The entitlement is an *immunity from suit* rather than a mere defense to liability, and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell v. Forsyth, ____U.S.____, ____, 105 S.Ct. 2806, 2816 (1985) (emphasis in original).

Qualified immunity premised upon the legal issue of whether or not the law was clearly established "is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell*, ____U.S. at ____, 105 S.Ct. at 2817. "[T]he appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." *Mitchell*, ____ U.S. at ____, 105 S.Ct. at 2816-2817 n.9.

The *Davis* Court applied these standards in reversing a decision made by lower courts since the law regarding procedures to be employed prior to a decision to discipline a public employee was not "clearly established." *Davis*, ____U.S. at ____, 104 S.Ct. at 3018-3019.[7] Even in addressing the

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[7] In *Davis*, the appellants did not seek review of the questions of whether or not the appellee's constitutional rights were violated. Furthermore, since the District Court lacked jurisdiction due to the doctrine of mootness to consider the constitutionality of Florida law, the Supreme Court only considered the issue of qualified immunity. *Davis*, ____ U.S. at ____, 104 S.Ct. at 3017.

question of what due process required, the *Davis* Court cited *Arnett v. Kennedy,* 416 U.S. 134 (1974), and *Bishop v. Wood,* 426 U.S. 341 (1976), as representing cases "in which the requirements of due process were met . . . ." *Davis,* ____U.S. at ____, 104 S.Ct. at 3019 n.10

The Court expressly considered the lack of clarity in the law in addressing qualified immunity. In this discussion, the Court noted:

> Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher-level executive levels who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can comply with them only selectively." [citation omitted]

Davis, ____U.S. at ____, 104 S.Ct. at 3021.

The decision in *Davis* recognized that the law regarding procedures prior to a decision to impose discipline was not clearly established. Accordingly, the Florida officials' qualified immunity barred damages. *Davis,* ____U.S. at ____, 104 S.Ct. at 3021. Nor did *Davis* clearly establish what the law was. The issue of what the constitution required was not before the Court. *Davis,* ____U.S. at ____, 104 S.Ct. at 3017.

Moreover, the case of *Arnett v. Kennedy,* the very case that determined that it was constitutionally permissible to discharge public employees without any procedures prior to the decision to impose discipline, so long as there was an adequate post-decisional due process procedure, was cited in *Davis* with approval. *Davis,* ____ U.S. at ____, 104 S.Ct. at 3019 n.10. The decision in *Arnett* was a plurality opinion that noted:

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures

> which are to be employed in determining that right, *a litigant in the position of appellee must take the bitter with the sweet.*

Arnett, 416 U.S. at 154 (emphasis added).

In a concurring opinion, two other justices reached the same result that no predecisional procedure was constitutionally required, for different reasons. The concurrence recognized that

> a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial.

Arnett, 416 U.S. at 168 (Powell, J., concurring).

It was not until *Loudermill* that the Court rejected the "bitter with the sweet" approach to public employee discipline articulated by the Court in *Arnett. Loudermill,* ____U.S. at ____, 105 S.Ct. at 1493.

The *Davis* Court recognized in 1984 that qualified immunity protects public officials, in their individual capacity, from damages claims in these circumstances. *Davis,* ____U.S. at ____, 104 S.Ct. at 3021. Nevertheless, the Second Circuit determined that:

> Lopes, therefore, cannot claim qualified immunity on the grounds that he did not know or have reason to know in 1984 that the Constitution required some process before a permanent government employee could be dismissed.

Opinion of the Second Circuit, App. 2A.

The case of *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), which the Second Circuit pointed to as the case clearly

establishing what the law was, does not even deal with due process to be accorded in imposing discipline on public employees. Rather, *Logan* focused upon due process to be accorded prior to the extinction of a cause of action. *Logan* addressed what happened to a private sector employee's complaint to the Illinois Fair Employment Practices Commission as a result of the failure of a state official to conduct a timely hearing following the filing of the complaint and prior to expiration of the statutory time limit for action. *Logan*, 455 U.S. at 424–425.

Following *Logan*, the Court in *Davis*, in the context of a case dealing with due process to be accorded to public employees, determined that the law in the area was not clearly established. Thus, not only is the decision of the Second Circuit in this case in conflict with decisions of other circuits, as argued in part one of this Petition, *supra*, but the decision of the Second Circuit is also contrary to the decision of this Court in *Davis v. Sherer*.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should be granted to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Petitioner,

v.

ERNEST P. MELE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November one thousand nine hundred and eighty-six.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges,

---------- x

ERNEST P. MELE, Individually and on behalf of others similarly situated,

Plaintiff-Appellee,

—against— 86-7410

CONNECTICUT DEPARTMENT OF CORRECTION, RAYMOND M. LOPES, COMMISSIONER, Individually and Officially, VICTOR LIBURDI, WARDEN, CONNECTICUT CORRECTIONAL CENTER, CHESHIRE,

Defendants,

RAYMOND M. LOPES,

Defendant-Appellant.

---------- x

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Lopes contends that before the Supreme Court's decision in *Cleveland Bd. of Education v. Loudermill*, 105 S. Ct. 1487 (1985), it was not clear that an independent constitutional due process requirement had to be met before the state could deprive an individual of a state created property right, relying on *Arnett v. Kennedy*, 416 U.S. 134 (1974). In that case, however, only three justices concurred in the view that a state property interest is limited by the statutory procedures provided for taking it away. It was not the holding of the case. Certainly by 1982, when the Supreme Court decided *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, any lingering doubts the opinion in *Arnett* may have occasioned were dispelled. The Court squarely held that some form of process is due before the owner of a property interest in employment is finally deprived of it. Lopes, therefore, cannot claim qualified immunity on the grounds that he did not know or have reason to know in 1984 that the Constitution required some process before a permanent government employee could be dismissed.

2. Accordingly, the judgment of the district court is affirmed.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN,

/s/ Jon O. Newman
JON O. NEWMAN,

/s/ George C. Pratt
GEORGE C. PRATT,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ERNEST P. MELE, Plaintiff

v. Civil No. H-85-1072 (AHN)

RAYMOND LOPES, Et Al,
Defendants

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION TO DISMISS

The plaintiff is a former employee of the Connecticut Department of Corrections. He brings this action pursuant to 42 U.S.C. Sec. 1983 and 28 U.S.C. Sections 2201 and 2202, seeking monetary damages and injunctive and declaratory relief for alleged violations of his civil rights. He names Department of Corrections Commissioner Raymond M. Lopes, Cheshire Correctional Center Warden Victor Liburdi, Connecticut Governor William O'Neill and Connecticut Attorney General Joseph Lieberman as defendants. The defendants have moved to dismiss portions of this action for want of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. For the reasons set forth below, defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

The facts of this case center around the termination of the plaintiff's employment as a lieutenant in the Department of Corrections. The plaintiff was a permanent classified service state employee as defined by Conn. Gen. Stat. Sec. 5-193 et seq.

By letter dated May 1, 1984, he was suspended from his position and placed on leave of absence without pay, effective April 30, 1984, pending administrative investigation. The plaintiff was afforded no hearing prior to this suspension, nor was he given notice of the charges against him. By letter dated August 23, 1984 and signed by Warden Liburdi, the plaintiff was notified that he was dismissed from his position because he had been convicted of a crime. At this time, the plaintiff still had been given no notice of the charges against him and no opportunity to respond to such charges. The plaintiff submitted a grievance to the Commissioner of Administrative Services. After several appeals, the plaintiff's dismissal was upheld by the Employee's Review Board on February 25, 1985.

The defendants have moved to dismiss several claims on the following grounds: (1) All claims seeking damages against all defendants in their official capacities should be dismissed because they are barred by the Eleventh Amendment; (2) All claims against the Governor and Attorney General should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6); (3) All claims for prospective injunctive relief prohibiting the defendants from suspending or discharging permanent classified government employees in violation of due process should be dismissed as moot; (4) All claims challenging the facial validity of Conn. Gen. Stat. Sec. 5-240 should be dismissed because the plaintiff lacks standing and because the court should abstain from hearing such claims; and, (5) All claims against Commissioner Lopes in his individual capacity should be dismissed for failure to state a claim upon which relief can be granted.

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Keeping this standard in mind, the court makes the following determinations.

I

A suit for damages may not be maintained against the state itself, or against any agency or department of the state, unless the state has waived its sovereign immunity. *Florida Department of State v. Treasure Salvors,* 458 U.S. 670, 684 (1982). Section 1983 does not override a state's Eleventh Amendment immunity. *Quern v. Jordan,* 440 U.S. 332, 342 (1979). All the defendants are employees of the State of Connecticut. A suit against these defendants in their official capacities is ultimately a suit against the state itself because any monetary recovery would be expended on the public treasury. *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 101 n. 11 (1984). Thus, to the extent that the defendants are sued in their official capacities for monetary damages, this action is barred by the Eleventh Amendment. All claims for monetary damages against the defendants in their official capacities are DISMISSED.

II

Defendants O'Neill and Lieberman move to dismiss all remaining claims against them for failure to state a claim upon which relief can be granted. It has long been the law that officials are amenable to suit in their official capacities where injunctive and declaratory relief is the remedy sought. *See Ex parte Young,* 209 U.S. 123 (1908). While the defendant's personal involvement in the alleged deprivation is a prerequisite to maintaining a suit for damages under Sec. 1983, *see, e.g., McKinnon v. Patterson,* 568 F.2d 930, 934 (2d Cir. 1977), a supervisory official may be held responsible for the acts of his subordinates for the purposes of injunctive and declaratory relief. *Arthur v. Nyquist,* 573 F.2d 134 (2d Cir. 1978); *Project Release v. Prevost,* 463 F. Supp. 1033, 1037 (S.D.N.Y. 1978).

The plaintiff has not alleged any personal responsibility on the part of Defendants O'Neill and Lieberman within the meaning of 42 U.S.C. Sec. 1983. *See Williams v. Smith,* 781 F.2d

319, 323-24 (2d Cir. 1986) (outlining several ways in which a supervisory official may be personally involved). Any complaint which seeks monetary damages and does not contain some allegation that the defendant is chargeable with the personal responsibility for the alleged deprivation of a plaintiff's civil rights must be dismissed as insufficient. *McKinnon v. Patterson,* 568 F.2d at 934; *Johnson v. Glick,* 481 F.2d 1028, 1034 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973). Therefore, any claims against Defendants O'Neill and Lieberman in their individual capacities for monetary damages must be DISMISSED. However, the plaintiff has made sufficient claims for declaratory and injunctive relief against these two defendants in their official capacities to survive a motion to dismiss. *See Bogan v. New London Housing Authority,* 366 F.Supp. 861, 865 (D. Conn. 1973) (dismissal for failure to join state officers charged with enforcing statute). All claims which relate to these defendants in their official capacities and which seek declaratory or injunctive relief are NOT DISMISSED.

III

The defendants claim that the state no longer dismisses employees without pretermination hearings and that this fact renders all claims for prospective injunctive relief moot. This claim is without merit. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle Inc.,* 455 U.S. 283, 289 (1982). The defendants cannot render the plaintiff's claims moot by stating that they have stopped the alleged unlawful practice. The defendants' motion to dismiss all claims for prospective injunctive relief is DENIED.

IV

Connecticut General Statute Section 5-240 deals with the reprimand, suspension, demotion and dismissal of classified service state employees. It requires that a "permanent employee shall be given written notice of such dismissal at

least two weeks in advance of his dismissal. . . ." Conn. Gen. Stat. 5-240(c). While this statute is not comprehensive on its face, it is frivolous for the defendants to contend that the plaintiff cannot challenge the validity of this statute because it does not cover pretermination procedures. In cases concerning the termination of employees like the plaintiff, it appears to be the operative statutory provision. *See Coppola v. Personnel Appeal Board,* 174 Conn. 271, 274 (1978) (Where dismissal is in violation of the statute, an employee should be ordered reinstated.)

The defendants also maintain that the plaintiff has no standing to challenge the facial constitutionality of this statute. "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' " *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 484 (1982) (quoting from *Flast v. Cohen,* 392 U.S. 83, 99 (1968)). Ostensibly, Section 5-240 applies to any permanent classified service employee who is dismissed from his job. A person to whom a statute applies and who is adversely affected by it can draw its constitutionality into question in a declaratory judgment action. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 463 (1945); *see Heckler v. Mathews,* 465 U.S. 728, 740-41 n. 9 (1984) (standing appropriate where plaintiff was personally denied benefits); *cf. United States v. Raines,* 362 U.S. 17, 21 (1960) (A party to whom a statute may constitutionally be applied lacks standing to challenge the statute on the ground that it would be unconstitutional as applied to others.)

The defendants also state that this court should abstain from judging the constitutionality of the statute. Abstension is proper where a state statute might be construed as giving the plaintiff procedural rights to which he claims he is entitled under the federal constitution. *See Boehning v. Indiana State Employees Association, Inc.* 423 U.S. 6 (1975) (statute provided for hearing). However, where there is no ambiguity in the statue, abstension is not required. *See Wisconsin v. Constantineau,* 400 U.S. 433, 438-39 (1971) (no provision for notice

and hearing). Furthermore, abstension is not required where a case involving a challenged state statute does not involve complex issues of state law, the resolution of which would be disruptive of state efforts to establish a coherent policy. *Zablocke v. Redhail*, 434 U.S. 374, 379-80 n. 5 (1978).

Pretermination procedures in cases involving federally protected property interests are governed by federal law. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 1491-93 (1985). The statute in question is relatively clear in defining the steps which the state must take in terminating one's employment. It does not provide for a pretermination hearing; it only covers notice requirements. The defendants have not presented this court with a convincing reason to now decide that it should abstain from considering the constitutionality of this statute. Accordingly, the defendant's motion to dismiss all claims challenging the facial constitutionality of Sec. 5-240 is DENIED.

V

Finally, Defendant Lopes moves to dismiss all claims against him in his individual capacity on the ground that he is entitled to qualified immunity. According to *Harlow v. Fitzgerald*, 434 U.S. 555, 561-66 (1978), "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under the *Harlow* standard, defendants will be immune if, on an objective basis, their conduct was reasonable. *Malley v. Briggs*, 54 U.S.L.W. 4243, 4245 (March 5, 1986).

Defendant Lopes, as Commissioner of Corrections, is responsible for overall supervision and direction of all correctional institutions in Connecticut. Conn. Gen. Stat. Sec. 18-81. A supervisory official may be personally liable for monetary damages because he or she has created an unconstitutional policy or has allowed such a policy to continue. *McCann v.*

Coughlin, 698 F.2d 112, 125 (2d Cir. 1983); *Duchesne v. Sugarman*, 566 F.2d 817, 830-31 (2d Cir. 1977). The gravamen of Defendant Lopes' argument is that the law concerning pretermination or presuspension hearings was not made clear until the Supreme Courts decision in *Loudermill* on March 19, 1985. (See Defendant's Memorandum of Law, at 22). The plaintiff's employment was terminated in May, 1984. Accordingly, the plaintiff's right to a pretermination hearing was not a right "of which a reasonable person would have known." While this argument is an attractive one, it also provides an insufficient basis upon which to grant a motion to dismiss in the present case.

An essential principle of due process is that a deprivation of life, liberty, or property, must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The Supreme Court has established that a federal constitutional property right in continued employment exists under certain circumstances. *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). Connecticut General Statute Section 5-240(c) indicates that a "permanent employee" may be discharged "for misconduct, incompetency, or other reasons relating to the effective performance of his duties. . . ." The court will assume that this statutory language provides the plaintiff with a constitutionally protected interest.

Accordingly, "some kind of hearing" is required before an employee who has a constitutionally protected property interest in his employment is discharged. *Roth*, 408 U.S. at 569-70. This principle was not first enunciated by the *Loudermill* Court, but was simply reiterated as a principle established in past Supreme Court decisions. *Loudermill*, 105 S.Ct. at 1492-93. Thus, while Defendant Lopes could possibly claim he did not know what type of notice and hearing was required, it seems questionable that he can claim that he reasonably believed that no notice or hearing of any type was required. Although Defendant Lopes may eventually show that he is

entitled to qualified immunity, his motion to dismiss on this ground must now be DENIED.

Conclusion

(1) Defendants' Motion to Dismiss all claims against the Defendants in their official capacities for monetary damages is GRANTED.

(2) Defendants' Motion to Dismiss all claims against Defendants O'Neill and Lieberman in their individual capacities for monetary damages is GRANTED.

(3) Defendants' Motion to Dismiss on all other grounds raised in their motion is DENIED.

SO ORDERED.

Dated at Hartford, Connecticut, this 8th day of May, 1986.

/s/ Alan H. Nevas

ALAN H. NEVAS
UNITED STATES DISTRICT JUDGE

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides in pertinent part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of Conn. Gen. Stat. § 5-202 provides:

Sec. 5-202. Appeal by employee. (a) Any employee who is not included in any collective bargaining unit for state employees and who has achieved a permanent appointment as defined in subsection (r) of section 5-196 may appeal to the employees' review board if he or she is demoted, suspended or dismissed, or is aggrieved as a result of alleged discrimination, or unsafe or unhealthy working conditions or violations involving the interpretation and application of a specific state personnel statute or regulation. Such employee must have complied with preliminary review procedures. Such an appeal shall be submitted to the board within ten days of the completion of the final level of the preliminary review procedure, provided the first level of the procedure shall have been initiated no later than thirty calendar days from the date of the alleged violation, except that in cases of dismissal, demotion or suspension the grievance must be submitted directly to the third level of the procedure within twenty-one calendar days of the effective date of such action.

(b) Upon receiving an appeal, the board shall assign a time and place for a hearing and shall give notice thereof to the parties concerned. The hearing panel shall not be bound by

technical rules of evidence prevailing in the courts. If, after hearing, a majority of the hearing panel determines that the action appealed from was arbitrary or taken without reasonable cause, the appeal shall be sustained; otherwise, the appeal shall be denied. The hearing panel shall have the power to direct appropriate remedial action and shall do so after taking into consideration just and equitable relief to the employee and the best interests and effectiveness of the state service. The hearing panel shall render a decision within sixty calendar days from the date of the conclusion of the hearing.

(c) The employee in any such case shall be furnished, upon his request, with a copy of the transcript of the proceedings before the board. The chairman of the board shall establish a fair and reasonable fee per page to be charged for such transcript which fee shall not exceed the fee per page for a transcript charged by court reporters for the judicial district of Hartford-New Britain.

(d) Within ten days of the issuance date of a decision by a hearing panel sustaining an appeal, the appointing authority of the employee shall take such measures as are necessary to comply with the remedial action directed by the hearing panel.

(e) An employee laid off or dismissed by reason of economy, lack of work, insufficient appropriation, change in departmental organization or abolition of position may file an appeal with the board only on the grounds that the order of layoff or dismissal has not been determined in accordance with the provisions of section 5-241, provided such employee has initiated the third level of the preliminary review procedure within twenty-one calendar days of the effective date of such layoff or dismissal.

(f) All matters involving examination, including application rejection, type of examination or results, compensation for class or classes or duties, establishment of a new class or classes, compliance with health and safety standards and the Connecticut Occupational Safety and Health Act or

alleged discrimination in cases where an appeal as been filed with the human rights commission, shall not be appealable under this section.

(g) The first level of the preliminary review procedure preparatory to the filing of an appeal from an alleged grievable action other than dismissal, demotion or suspension shall be the aggrieved employee's supervisor or department chief or other employee as designated by the employee's appointing authority. Such aggrieved employee shall present his grievance in writing on a form developed by the commissioner of administrative services and the employee review board which form shall contain a statement of the date the alleged violation occurred and the relief sought in answer to the grievance. The first level designee shall give his answer to such employee within seven calendar days from the date the grievance is submitted to him or within seven days from the date of a meeting convened for the purpose of reviewing the grievance, in which case such meeting shall be convened within seven calendar days from the date the grievance is submitted.

(h) The second level of the preliminary review procedure preparatory to the filing of an appeal from an alleged grievable action other than dismissal, demotion or suspension shall be the aggrieved employee's appointing authority or designated representative. Such employee, upon receiving a response at the first level which he deems to be unsatisfactory, may proceed to this level by presenting the same form containing the first level answers within seven calendar days from the date the answer was given at the first level. The appointing authority or designated representative shall answer such employee within seven calendar days from the date the grievance is received or within seven calendar days from the date of a meeting convened for the purpose of reviewing such grievance, in which case such meeting shall be convened within seven calendar days from the date such grievance is received.

(i) The third level of the preliminary review procedure preparatory to the filing of an appeal from an alleged grievable

action including dismissal, demotion or suspension shall be the commissioner of administrative services or his designated representative. The employee, upon receiving a response at the second level which he deems to be unsatisfactory, may proceed to this level by presenting the same form containing the first and second level answers within seven calendar days from the date the answer was given at the second level, except in the case of a dismissal, demotion or suspension in which case such employee must present the form, completed but without answers at lower levels within twenty-one calendar days of the effective date of such action. The commissioner of administrative services or his designated representative shall reply to such employee within thirty calendar days from the date such grievance is received or within fifteen calendar days from the date of a meeting convened for the purpose of reviewing such grievance, in which case such meeting shall be convened within thirty calendar days from the date such grievance is received.

The text of Conn. Gen. Stat. § 5-240 provides:

Sec. 5-240. Reprimand, suspension, demotion, dismissal. (a) An appointing authority, subject to any regulations issued by the commissioner of administrative services, may reprimand an employee in the classified service under his jurisdiction or suspend such an employee without pay or with reduced pay for an aggregate period not exceeding sixty calendar days in any calendar year.

(b) An appointing authority, subject to any regulations issued by the commissioner of administrative services, may demote an employee in the classified service under his jurisdiction from a position in any given class or grade to a position in a lower class or grade. The appointing authority shall give the commissioner of administrative services written notice of his intention to effect any such demotion not less than two weeks before the date it is intended to become effective. The commissioner of administrative services may transfer such an employee whose record is otherwise satisfactory to

a position under the jurisdiction of another appointing authority, with the approval of such other appointing authority.

(c) An appointing authority may dismiss any employee in the classified service when he considers the good of the service will be served thereby. A permanent employee shall be given written notice of such dismissal at least two weeks in advance of his dismissal, except as hereinafter provided, and a copy of the same shall be filed with the commissioner of administrative services. Such notice shall set forth the reasons for dismissal in sufficient detail to indicate whether the employee was discharged for misconduct, incompetency or other reasons relating to the effective performance of his duties and shall be prepared in such form and given in such manner as the commissioner prescribes. The commissioner of administrative services may provide by regulation for the waiving of advance notice in cases of serious misconduct by an employee affecting the public, the welfare, health or safety of patients, inmates or state employees or the protection of state property. Such regulation shall provide for written notice to a permanent employee who has attained permanent status and shall not preclude whatever rights any employee may have to appeal. The name of any such employee dismissed for incompetency or other reasons relating to the effective performance of his duties shall be immediately removed from the eligible list in the office of the commissioner of administrative services.

Supreme Court, U.S.
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No. 86-1284

In The
Supreme Court Of The United States

OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the Connecticut Department of Correction, in his individual capacity,
Petitioner,

v.

ERNEST P. MELE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE:

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QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN HOLDING THAT THE PETITIONER CANNOT CLAIM QUALIFIED IMMUNITY ON THE GROUNDS THAT HE DID NOT KNOW OR HAVE REASON TO KNOW IN 1984 THAT THE CONSTITUTION REQUIRED SOME PROCESS BEFORE A PERMANENT GOVERNMENT EMPLOYEE COULD BE DISMISSED?

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STATEMENT OF THE CASE

This case is a civil rights action brought in the United States District Court for the District of Connecticut by the Respondent, Ernest P. Mele, pursuant to 42 U.S.C. Section 1983 and the Declaratory Judgment Act, 28 U.S.C. Sections 2201, 2202. Jurisdiction of the District Court was based upon 28 U.S.C. Sections 1331, 1343.

The Respondent, Ernest P. Mele, was a permanent classified state service employee, employed as a lieutenant in the Connecticut Department of Corrections. J.A. 6,34. 1/

1/ The abbreviation "J.A." refers to the Joint Appendix filed with the United States Court of Appeals for the Second Circuit.

He was advised by letter dated May 1, 1984 that he was being placed on leave of absence without pay for thirty days, effective April 30, 1984, pending administrative investigation. J.A. 26. He was given no notice of the charges against him and no opportunity to respond to those charges prior to being placed on leave of absence without pay. J.A. 6, 7, 34. By letter dated May 24, 1984, he was notified that his leave of absence without pay had been extended for an indefinite period. J.A. 27.

By letter from Warden Victor Liburdi, dated August 23, 1984, Mele was informed that he was being dismissed , effective April 30, 1984, for conviction of a crime. J.A. 28. Mele was given no notice of the charges against him or an opportunity to

respond to those charges prior to his termination. J.A. 7, 35.

Respondent subsequently initiated suit in the United States District Court for the District of Connecticut alleging procedural and substantive due process violations. J.A. 8, 9. Respondent also challenged the constitutionality of Connecticut General Statutes Section 5-240, on its face and as applied to him. J.A. 10. Following an amendment to the Respondent's complaint, the named defendants in this action were Raymond M. Lopes, Commissioner of Corrections, in his official and individual capacities, William A. O'Neill, in his capacity as Governor of the State of Connecticut, Joseph I. Lieberman, in his capacity as

Attorney General of the State of Connecticut, and Victor Liburdi, Warden of the Connecticut Correctional Center - Cheshire, in his official and individual capacities. J.A. 3-5.

On February 4, 1986, the defendants moved the District Court, pursuant to Fed.R. Civ.Pro. 12(b)(2) and 12(b)(6) to dismiss several claims against them. J.A. 13-15. The defendants' motion was granted in part and denied in part. J.A. 41. The only aspect of the defendants' motion to dismiss which is relevant to this Petition was the denial with respect to Petitioner Lopes in his individual capacity. Petitioner Lopes had claimed that he was entitled to qualified immunity since the law regarding due process to be afforded permanent state

employees with property rights in their employment was not clearly established before this Court's decision in Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S.Ct. 1487 (1985). Lopes's claim was rejected by the district court. J.A. 39-41.

Petitioner Lopes appealed the District Court's decision, on the qualified immunity issue, to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed the District Court's decision in an unreported opinion dated November 6, 1986. The Second Circuit concluded that case law prior to Loudermill made it clear that some form of process is due before the owner of a property interest in employment is finally deprived of it.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982) the Supreme Court held that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. Id at 818. It is the Petitioner's position that the right of a public employee to notice and an opportunity to be heard prior to a decision of termination or suspension was not clearly established until the March 19,

1985 decision in Cleveland Board of Education v. Loudermill, ___U.S.___, 105 S.Ct. 1487 (1985).

Contrary to Petitioner's position, the due process requirements were clearly established prior to Loudermill. As long ago as 1914, the Supreme Court emphasized that "the fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). In several decisions commencing in the 1950s the Supreme Court concluded that public employees have interests in maintaining their jobs that cannot be abridged without due process. See, for instance, Slochower v. Board of Education, 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S 183 (1952); Board of Regents v. Roth,

408 U.S. 564 (1972).

In January of 1972, twelve years prior to the Respondent's suspension and dismissal, the Supreme Court reaffirmed that "before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, except [in] extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S 371, 379 (1972).

In Loudermill, supra, the Supreme Court reiterated that certain substantive rights - life, liberty, property - cannot be taken away except pursuant to constitutionally adequate procedures and that a property interest could not be "defined by the procedures provided

for its deprivation." Id. at 1493. It is the Petitioner's position that the holding in Loudermill represented a departure from this Court's prior holdings.

Petitioner's argument appears to have its genesis in the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), which Petitioner cites for the "bitter with the sweet " approach to public employee discipline. This approach, however, gathered the support of only three justices in Arnett and was specifically rejected by the other six. See, for instance, 416 U.S. at 166-167 (Powell, J. joined by Blackmun, J.); Id at 177-178 (White, J.); Id at 211 (Marshall, J. joined by Douglas and Brennan, JJ.). Thus, the position in Arnett which Petitioner argues was the

law prior to Loudermill was only a minority view held by the Chief Justice and Justices Rehnquist and Stewart. While a plurality of the Court reached the conclusion that there had been no due process violation in Kennedy's case, the 'bitter with the sweet' approach was not adopted by the plurality in Arnett.

Contrary to Petitioner's assertion, Arnett did not decide that no hearing was due an employee prior to termination. Rather, Arnett decided that no full evidentiary hearing was required before termination, with Justices Stewart, Burger and Rehnquist reaching that conclusion on the basis that since the state statute created the property right it could also create the procedural safeguards for it and

Justices Powell and Blackmun reaching the same conclusion through reasoning that since there was advance notice of the charges against the employee and given a balancing of the competing interests of the permanent employee and the government no full evidentiary hearing was required. 2/

Since Arnett the 'bitter with the

2/ The precise issue before the Arnett court was not whether any hearing is required by the Fourteenth Amendment prior to termination of a permanent state employee, but, whether, a full evidentiary hearing is required prior to such termination. The Arnett court's response was, of course, "no".

Further, it must be noted that in Arnett the statutory scheme and attendant regulations which created the property right in employment also created extensive procedural safeguards of that right which were afforded to employees prior to adversary action and it is precisely that scheme and its attendant regulations which were found to be constitutional by the plurality.

sweet' theory, seemed to gather some additional support. For instance, see Bishop v. Wood, 426 U.S 341, 355-361 (1976) (White, J. dissenting). Goss v. Lopez, 419 U.S.-- at 586-587 (Powell, J. joined by Burger, CJ and Blackmun and Rehnquist, JJ. dissenting). 3/

3/ Unlike Arnett, Bishop v. Wood did not deal with the issue of what procedural due process was due but addressed the issue whether a Marion, North Carolina city ordinance providing that a permanent employee may be discharged if he fails to perform work up to the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties should be read to prohibit discharge for any other reason, thus conferring tenure on all permanent employees and creating property interests in employment. A majority of the Court held that no such property interest was created by the ordinance, since the ordinance could also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures. Thus, the majority in Bishop interpreted the ordinance to grant procedural but no substantive rights.

Subsequently, however, the Supreme Court has clearly rejected this position. In Vitek v. Jones, 445 U.S. 480, 491 (1980) , for instance, it pointed out that " minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." This conclusion was reiterated by the Supreme Court in Logan v. Zimmerman Brush Co. , 455 U.S. 422 (1982) where the Supreme Court reversed a lower court's holding that because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement. The Supreme

Court stated that

> [e]ach of our due process cases has recognized, either explicitly or implicitly, that because minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the state may have specified its own procedures that it may deem adequate for determin-ing the preconditions of adverse official action... Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach... As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus, it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest. 455 U.S. at 431-32 (citing Board of Regents v. Roth, 408 U.S. at 570-71, n. 8).

It was in light of these holdings, subsequent to Arnett, that the Supreme Court in Loudermill stated that "it is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee... The point

is straightforward: the Due Process Clause provides that certain substantive rights - life, liberty, property - cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. " 105 S.Ct. at 1493.

Thus, this Court in Loudermill itself makes clear that its decision, far from being a departure from earlier precedent, is merely in keeping with its articulation of due process guarantees and requirements commencing with Vitek in 1980 and continuing with Logan in 1982, both well prior to the time that the Respondent was suspended and terminated without a hearing.

The Court of Appeals was thus correct in concluding that Petitioner's

actions as alleged in Respondent's complaint, violated clearly established constitutional rights of which a reasonable person would have known, cf. Harlow v. Fitzgerald, supra, at 815, in affirming the decision of the district court. 4/

4/ Davis v. Scherer, 468 U.S. 183, 192 n. 10 (1984), upon which Petitioner relies, itself makes clear that in the decisions of this Court by 1978 had required 'some kind of a hearing' .... prior to discharge of an employee who had a constitutionally protected property interest in his employment. But the Court had not determined what kind of a hearing must be provided. (Citations omitted, emphasis added.)

II. THERE IS NO CONFLICT BETWEEN THE HOLDING BELOW AND DECISIONS FROM OTHER CIRCUITS.

Contrary to the Petitioner's assertion, Brasslett v. Cota, 761 F.2d 827 (1st Cir.1985) is not contrary to the Second Circuit's decision in the instant case. In Brasslett the plaintiff, a former town fire chief, alleged, inter alia, procedural due process violations because the town had discharged him without providing him with a pretermination evidentiary hearing Id. at 835. The plaintiff did, however, have a pretermination conference with the town manager, during which he was notified of the possibility of discharge and was afforded ample opportunity to defend

his actions and to rebut any erroneous allegations. Id. at 836.

The First Circuit considered the question whether the plaintiff in Brasslett was entitled to a pretermination evidentiary hearing and, if not, whether he received the minimum process due him under the Fourteenth Amendment. In so doing, the First Circuit did refer to this Court's decision in Loudermill, recognizing that there this Court "delineated the scope of pretermination procedures that are due public employees" Id. at 836. The First Circuit relied on Loudermill not for authority on whether pretermination hearings were mandated by the due process clause of the Fourteenth Amendment, but for authority on the type of pretermination procedures so

mandated. The First Circuit thus concluded that the plaintiff was not entitled to a pretermination evidentiary hearing and that procedural due process requirements were met when the plaintiff was afforded his pretermination conference with the town manager. 5/

The Fifth Circuit's decision in

5/ It should be noted that the First Circuit in Brasslett recognized that this Court in Loudermill "clearly reiterated its rejection of the oft-cited plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), which advanced the proposition that a public employee's property interest in his employment is circumscribed by the deprivation procedures prescribed by the government." Id. at 836, n.7. The First Circuit also recognized that Loudermill was dispositive of the plaintiff's procedural due process arguments.

Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985)was also in keeping with Loudermill. In Levitt the court noted that due process protections to which a tenured professor is entitled before he may be dismissed were enunciated in Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

> These minimum standards described the boundaries within which the state has discretion to adopt the procedures it finds most appropriate. These include the right of a professor to: (1) be advised of the cause for his termination in sufficient details so as to enable him to show any error that may exist; (2) be advised of the names and the nature of the testimony of the witnesses against him; (3) a meaningful opportunity to be heard in his own defense within a reasonable time; (4) a hearing before a tribunal that possesses some academic expertise and an apparent impartiality toward the charges. Id. at 1228.

The Levitt court then addressed the plaintiff's claims in light of the foregoing requirements.

Brown v. Trench, 787 F.2d 167 (3rd Cir. 1986), also cited by the Petitioner, stood for the proposition that an employee with property rights in her employment was denied due process when she was not granted a pretermination hearing. Id. at 172. In Buschi v. Kirven, 775 F. 2d 1240, (4th Cir. 1985) the court's holding on the due process issue was that the plaintiff therein received the hearing required by Loudermill and was thus not entitled to relief. Id. at 1255-56. Finally, Cohen v. City of Philadelphia, 736 F. 2d 81 (3rd Cir. 1984), cert. denied, ——— U.S. ———, 105 S. Ct. 434 (1984) was factually similar and

analogous to Parratt v.Taylor, 451 U.S. 527 (1981), where any constitutional violation resulted not from some established state procedure but from a random and unauthorized act by a state employee and thus the pre-deprivation process afforded the plaintiff was constitutionally adequate. Cohen, 736 F. 2d. 84, 86.

Thus, the very cases which Petitioner cites as evidencing conflict among the Circuits demonstrate that there is no such conflict. 6/

6/Although conflicts between decisions of Federal Circuit Courts of Appeals may provide grounds for a grant of certiorari under 28 U.S.C., Section 1254-1, certiorari will be granted in cases in which a settlement of the question by the Supreme Court is required. See Universal Camera Corporation v. NLRB, 340 U.S. 474 (1951). The issue which petitioner herein is raising, however, has already been reviewed and settled by the Supreme Court. See discussion, supra.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CASE NO. 86-1284

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the Connecticut Department of Corrections, in his individual capacity,

Petitioner,

v.

ERNEST P. MELE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF OHIO AND ELEVEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER A CONSTITUTIONAL RIGHT TO A PRETERMINATION HEARING PROMULGATED IN *CLEVELAND BD. OF EDUC. V. LOUDERMILL*, 105 S. CT. 1487 (1985) CAN BE DETERMINED TO HAVE BEEN CLEARLY ESTABLISHED WHEN PRIOR TO THAT DECISION, THE FEDERAL COURTS WERE DIVIDED AS TO WHETHER THE CONSTITUTION MANDATED SUCH A RIGHT.

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CASE NO. 86-1284

IN THE

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OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the
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Petitioner,

v.

ERNEST P. MELE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF OHIO AND ELEVEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

Amici, State of Ohio and other states, pursuant to Supreme Court Rule 36.4, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on November 6, 1986.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was entered on November 6, 1986. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. §1254[1]

INTEREST OF AMICI CURIAE

This case presents the Court with the opportunity to review the application of the qualified immunity doctrine by addressing the issue of whether the right to a pretermination hearing announced in *Cleveland Bd. of Educ. v. Loudermill,* 105 S. Ct. 1487 (1985) was clearly established prior to the *Loudermill* decision.

Unfortunately, the question presented herein does not arrive from an isolated case. Civil rights actions stemming from the failure of public officials to provide pretermination hearings prior to *Loudermill* are widespread throughout the country.[1] By subjecting public officials to the threat of personal liability, these lawsuits ultimately impair the functioning of state government. Therefore, because a proper application of the qualified immunity doctrine would make lawsuits such as the instant case amenable to summary judgment, the amici have a substantial interest in the outcome of the issue presented herein for review.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Second Circuit held that a public official who failed to provide a state employee with a pretermination hearing could not avail himself of the protection afforded by the qualified immunity doctrine. The court summarily determined that the right to a pretermination hearing had been clearly established prior to

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[1]As in the instant case, it is not uncommon for such lawsuits to be filed as class actions. *See e.g., D'Acquisto v. Washington,* 640 F. Supp. 594 (N.D. Ill. 1986).

this Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985).

In light of this Court's recent decision in *Mitchell v. Forsythe*, 105 S. Ct. 2806 (1985), it is clear that the analysis employed by the Second Circuit is flawed. In *Mitchell*, this Court reasoned that public officials should not be held accountable for abridging a right that was not even uniformly recognized by the federal courts. Applying this principle to the instant case reveals that the right to a pretermination hearing was a grey area until the *Loudermill* decision and thus public officials could have reasonably been mistaken as to whether the Constitution mandated such a right.

The significance of the Second Circuit's decision is amplified by the fact that since *Loudermill*, public officials throughout many states have been subject to personal liability for failing to provide pretermination hearings before *Loudermill* was decided. Those cases should have bee amenable to summary judgment pursuant to the standards set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny. Instead, such cases continue to interfere with the effective discharge of public service. A writ of certiorari must be granted in order to alleviate further unwarranted litigation.

ARGUMENT

I. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS EFFECTIVELY HOLDS STATE PUBLIC OFFICIALS TO A GREATER UNDERSTANDING OF THE LAW THAN OUR NATION'S JUDICIARY AND IS THEREFORE IN CONFLICT WITH THIS COURT'S DECISION IN *MITCHELL V. FORSYTHE*, 105 S. CT. 2806 (1985).

In the recent case of *Mitchell v. Forsythe*, 105 S.Ct. 2806 (1985), this Court expounded upon the application of the qualified immunity docterine. In *Mitchell*, the plaintiff brought suit against a former United States Attorney General, alleging

that in 1970, the Attorney General had authorized a warrantless wiretap. The use of warrantless wiretaps was later found to be violative of the Fourth Amendment's proscription against unreasonable searches and seizures in *United States v. United States District Court,* 407 U.S. 297 (1972) (*Keith*). The Court found that the Attorney General was shielded from liability under the doctrine of qualified immunity because the law announced in *Keith* had not been clearly established at the time the Attorney General had authorized the search. One of the primary factors which led to this determination was the Court's observance that prior to its holding in *Keith,* the lower federal courts were in sharp disagreement regarding the legitimacy of warrantless wiretapping. *Mitchell,* 105 S.Ct. at 2819.

Implicit from the Court's analysis in *Mitchell* is the proposition that when a dichotomy exists among the federal judiciary concerning whether a particular action violates a constitutional right, the right cannot be deemed to have been clearly established. Thus, the disagreement which existed prior to *Loudermill* over whether a pretermination hearing was mandated by the Due Process Clause indicates that the right announced in *Loudermill* had not been clearly established. While some courts had reasoned that pre-*Loudermill* cases compelled a pretermination hearing, *see Abraham v. Pekarski,* 728 F.2d 167, 170 (3d Cir. 1984); *Wentz v. Klecker,* 721 F.2d 244 (8th Cir. 1983); *Ashton v. Civiletti,* 613 F.2d 923, 931 (D.C. Cir. 1979), a substantial number of other courts had held either that a pretermination hearing was not required or that the failure to provide one could be cured by a post-termination hearing. *See Detweiler v. Virginia Dept. of Rehabilitative Services,* 705 F.2d 557, 560 (4th Cir. 1983) (a post-termination hearing with an adequate remedy is sufficient to satisfy due process requirements); *Davis v. Scherer,* 468 U.S. 183, 192, *rehearing denied* 468 U.S. 1226 (1984) (pretermination hearing requirement expressly disavowed by the Fifth Circuit); *Thompson v. Bass,* 616 F.2d 1259 (5th Cir. 1980) (pretermination hearing required, but lack cured by full post-termination hearing); *Brown v. Brienen,* 722 F.2d 360 (7th Cir. 1983); *Ciechon v. City of Chicago,* 634 F.2d 1055 (7th Cir. 1980) (post-suspension

hearing adequate); *Best v. Boswell,* 696 F.2d 1282, 1288 (11th Cir. 1983) (lack of pretermination hearing cured by post-termination hearing); *see also Parfitt v. Columbus Correctional Facility,* 62 Ohio St.2d 434, *cert. denied,* 449 U.S. 1061 (1981) (a state civil service employee did not have a right to a pretermination hearing). Consequently, the Second Circuit's conclusion that the right to a pretermination hearing was "clearly established" prior to *Loudermill* "is to give that phrase a meaning that it cannot easily bear." *Mitchell,* 105 S.Ct. at 2820.

The underlying rationale of *Mitchell,* therefore, is that public officials should not be subject to liability for failing to predict the future course of constitutional law, especially when there are discordant views among the federal courts as to what the Constitution requires. This rationale was reflected in the recent decision of *De Abadia v. Izquierdo Mora,* 792 F.2d 1187 (1st Cir. 1986) in which the First Circuit Court of Appeals further refined the proper scope of protection that is meant to be afforded to public officials under the qualified immunity doctrine. The court stated:

> The first question is what is meant by "clearly established." We consider it to be something less than requiring the public official to show that the principle of law did not exist, or there would be little left; there would be few cases on which officials could succeed. Only rarely do legislatures or courts introduce or change whole principles. More often, the process of change involves a sharpening of lines in the law's grey areas, absent which there could reasonably be excusable mistakes. *Id.* at 1190.

As indicated by the number of conflicting decisions which preceded *Loudermill,* the issue presented in that case undoubtedly involved a grey area of the law. By failing to acknowledge the existence of that grey area, the decision of the Second Circuit improperly restricts the scope of protection that *Mitchell* requires for public officials. In view of the

pervasiveness of civil rights actions that are today filed against public officials, *see* Note, QUALIFIED IMMUNITY, 34 DRAKE L. REV. 873, 877 (1985), any undue erosion of this protection encroaches upon the interests of states throughout the nation. Therefore, it is imperative that a writ of certiorari be granted to review the decision of the Second Circuit Court of Appeals and to prevent any further misapplications of the qualified immunity doctrine.

II. THE DECISION OF THE SECOND CIRCUIT MUST BE OVERTURNED TO FACILITATE THE PROMPT DISMISSAL OF CIVIL RIGHTS ACTIONS WHICH SEEK TO RECOVER DAMAGES FROM PUBLIC OFFICIALS WHO DID NOT PROVIDE PRE-TERMINATION HEARINGS PRIOR TO THE DECISION RENDERED IN *CLEVELAND BD. OF EDUC. V. LOUDERMILL*, 105 S. CT. 1487 (1985).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court refashioned the qualified immunity doctrine in a way which now facilitates the summary dismissal of many insubstantial claims. In formulating this standard, the Court was motivated by several policy concerns which underscore the need for granting at least limited immunity to government officials. In addition to the obvious threat of liability for monetary damages, the Court noted other concerns including "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Id. at 816. These policy interests are seriously implicated where, as in the instant case, the plaintiff is seeking to recover damages for being denied a pretermination hearing despite the fact that the plaintiff's discharge occurred prior to the *Loudermill* decision.

In such cases, public officials have been held liable for back pay for the period during which the plaintiff was discharged without a hearing, regardless of whether the plaintiff's employment was terminated for just cause. *See Skeets v. Johnson*, 805 F.2d 767 (8th Cir. 1986); *Hopkins v. City of Wilmington*, 615

F. Supp. 1455 (D.C. Del. 1985). Even where courts have held this type of relief to be unavailable, state officials have still been held subject to liability for any damages resulting from the failure to provide a timely hearing, including damages for mental distress. *Gleason v. Bd. of City Comm'rs,* 620 F. Supp. 632 (D.C. Colo. 1985); *DeSimone v. Bd. of Educ.,* 612 F. Supp. 1568 (D.C. N.Y. 1985). Such lawsuits distract officials from their governmental duties and may impose the additional burden of requiring officials to retain their own counsel at their own expense. *Tubbesing v. Arnold,* 742 F.2d 401, 404 n.3 (8th Cir. 1984). Clearly, the exposure of public officials to these costs for violating a "right" that was not even uniformly recognized by the federal judiciary is a measure that disrupts the balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer,* 468 U.S. 183, 195 (1984).

The foregoing analysis reveals that the decision of the Second Circuit does not stand in isolation. Rather, state officials throughout the country have encountered personal liability in cases that should have been resolved on summary judgment through a proper application of the qualified immunity doctrine. In order to prevent further undue litigation which would continue to subvert the policy interests which this Court has recognized, a writ of certiorari must be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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